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No. 90-1414

In the Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF NORTH DAKOTA, EX REL. BOARD OF UNIVERSITY AND SCHOOL LANDS, PETITIONER

v.

EDWARD R. MADIGAN, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Pursuant to 16 U.S.C. 3835(a)(1)(C), the Secretary of Agriculture has the discretion to waive the three-year ownership requirement for land to be placed in the Conservation Reserve Program if "the Secretary determines that the land was acquired under circumstances that give adequate assurance that such land was not acquired for the purpose of placing it in the [Conservation Reserve] program." The question presented is:

Whether the Secretary's decision not to waive the three-year ownership requirement for land to be placed in the Conservation Reserve Program is unreviewable under the Administrative Procedure Act because it is "committed to agency discretion by law," 5 U.S.C. 701(a)(2).

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 3a-24a, is reported at 914 F.2d 1031. The opinion of the district court, Pet. App. 25a-34a, is reported at 711 F. Supp. 517.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1990. A petition for rehearing was denied on December 11, 1990. Pet. App. 2a. The petition for a writ of certiorari was filed on March 8, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title XII of the Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1504, authorized establishment of the Conservation Reserve Program (CRP). Congress created the CRP to conserve and improve highly erodible cropland. Landowners with land in the CRP enter into a contract with the Secretary of Argriculture, under which they receive rental payments in exchange for agreeing not to use the land for agricultural purposes, except as permitted by the Secretary. See 16 U.S.C. 3831, 3832.

Participation in the CRP is restricted by statute to persons who have owned the land sought to be enrolled for three years. 16 U.S.C. 3835(a)(1). There are four exceptions to this requirement. One of the exceptions authorizes the Secretary to waive the requirement if "the Secretary determines that the land was acquired under circumstances that give adequate assurance that such land was not acquired for the purpose of placing it in the [CRP]." 16 U.S.C. 3835(a)(1)(C). To apply that exception, the Secretary has administratively developed a rebuttable presumption that all land acquired after October 1, 1985—a date after which the CRP was well publicized—was probably acquired because of the existence of the CRP, and, for that reason, the Secretary could not be adequately assured that such land was not acquired for the purpose of having that land placed in the program. The presumption can be rebutted by showing that the property could not have been admitted into the program at the time of the transfer, or that the transfer was one of form rather than substance. Pet. App. 7a-8a, 33a.

2. Petitioner the State of North Dakota applied to have two tracts of land that it acquired through mortgage foreclosures placed in the CRP. Pet. App. 7a. Having owned the land for less than three years, petitioner sought a waiver of the three-year ownership rule pursuant to 16

U.S.C. 3835(a)(1)(C). The Secretary determined that petitioner had failed to provide adequate assurances that the land – which it acquired after October 1, 1985 – was not acquired for placement in the conservation program. Pet. App. 7a.

North Dakota then filed suit in district court arguing that the Secretary's actions were arbitrary, capricious, and an abuse of discretion, in violation of the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* In response, the government argued that Congress committed the waiver determination to the Secretary's discretion in the Food Security Act of 1985 and that the Secretary's refusal to grant a waiver was not subject to judicial review under the APA, which precludes review when "agency action is committed to agency discretion by law." 5 U.S.C. 701(a)(2). The district court agreed that the waiver determination was committed to the Secretary's discretion and was not subject to APA review. Pet. App. 25a-32a. The court concluded that "there are no meaningful standards by which a court can assess the agency's determination that 'adequate assurances' do not exist for waiving the three-year ownership rule." *Id.* at 31a.[1]

3. The court of appeals affirmed by a divided vote. Pet. App. 3a-24a. The court upheld the lower court's ruling that the Secretary's decision whether to waive the statutory three-year ownership requirement was committed to agency discretion by law and was unreviewable under the APA by virtue of 5 U.S.C. 701(a)(2). In reaching that conclusion,

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[1] Nonetheless, the district court went on to review the date-of-acquisition standard adopted by the Secretary and held that it was arbitrary, capricious, and an abuse of discretion. Pet. App. 34a. The court then directed the Secretary to promulgate regulations implementing the waiver provision. *Ibid.* The court of appeals unanimously reversed the district court's ruling on this issue, *id.* at 14a-19a; *id.* at 19a (opinion of Larson, J.), and petitioner has not sought review in this Court of that aspect of the decisions below.

the panel majority ruled that, in making the reviewability determination, this Court's decisions in *Heckler* v. *Chaney*, 470 U.S. 821 (1985), and *Webster* v. *Doe*, 486 U.S. 592 (1988), required a focus on the language of the governing statute, instead of reliance on the type of pragmatic considerations that the Eighth Circuit had previously considered in *Tuepker* v. *Farmers Home Admin.*, 708 F.2d 1329 (1983).[2] Following that approach, the majority observed that the waiver provision at issue here "gives the Secretary extremely broad discretion and supplies no objective criteria for determining the existence of adequate assurance." Pet. App. 13a. Thus, the court concluded that it was "unable to discern from the language of the statute any meaningful standard against which a court could judge the Secretary's exercise of his discretion to determine whether adequate assurance exists." *Ibid.*[3]

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[2] The Eighth Circuit held in *Tuepker* that the determination whether there is "law to apply" required a court to review the allegations in the complaint along with the governing statutes and regulations to determine "(1) whether the challenged agency action is of the type Congress intended to be left to a reasonable exercise of agency expertise; and (2) whether the problem raised is one suitable for judicial determination." 708 F.2d at 1332.

[3] Having determined that there was no review under the APA of the Secretary's waiver determination, the court ruled that the district court lacked the authority to scrutinize and invalidate the Secretary's date-of-acquisition standard for waiver decisions. Pet. App. 14a; see page 3 note 1, *supra*. The court of appeals also reversed the district court's order directing the Secretary to promulgate substantive regulations setting forth standards for determining under what circumstances the three-year ownership rule would be waived and procedural regulations implementing the CRP. The court held that the Secretary's existing regulations afforded sufficient procedural safeguards, and the Secretary was not required to promulgate regulations establishing substantive standards for waiver determinations, but could instead develop such standards through case-by-case adjudication. *Id.* at 15-20a. Petitioner no

On the reviewability issue, Senior District Judge Larson dissented. He concluded that the Secretary's waiver determination was reviewable because the term "adequate assurance" as used in the waiver provision provided a meaningful standard by which to evaluate the Secretary's final ruling. Pet. App. 22a.

ARGUMENT

1. The APA precludes judicial review when "agency action is committed to agency discretion by law." 5 U.S.C. 701(a)(2). In *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), this Court first explained what it means for agency action to be "committed to agency discretion." The Court said that Section 701(a)(2) applies "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" 401 U.S. at 410 (quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)). Fourteen years later, in *Heckler* v. *Chaney*, 470 U.S. 821 (1985), this Court further elaborated on the "no law to apply" standard. In *Chaney*, prison inmates sentenced to death by lethal injection challenged the Food and Drug Administration's refusal to enforce an alleged statutory prohibition against such use of the drugs. While acknowledging that agency determinations regarding whether or not to pursue enforcement actions are presumptively unreviewable, this Court also stated that there is "no law to apply" for Section 701(a)(2) purposes and judicial "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." 470 U.S. at 830.

Webster v. *Doe*, 486 U.S. 592 (1988), contains this Court's most recent discussion of reviewability under Section

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longer takes issue with the court of appeals' ruling on this question. Pet. App. i.

701(a)(2). *Webster* was not an enforcement action, but a case in which a discharged CIA employee sought reinstatement. In *Webster*, the Court stressed that the determination whether agency action is unreviewable under 5 U.S.C. 701(a)(2) requires a close consideration of the text of the governing statute. As this Court explained, "[b]oth *Overton Park* and *Heckler* emphasized that § 701(a)(2) requires careful examination of the statute on which the claim of agency illegality is based." 486 U.S. at 600. The Court observed that the statute at issue in *Webster*—which authorized the Director of Central Intelligence to discharge a CIA employee whenever the Director "shall deem such termination necessary or advisable"—was one that "fairly exudes deference" to the agency. *Ibid.* Accordingly, the Court determined that "the language and structure of [the statute involved] indicate that Congress meant to commit individual employee discharges to the [CIA] Director's discretion," *id.* at 601, thereby precluding judicial review under the APA.

In this case, the court of appeals applied *Chaney* and *Webster*, examining the text of the waiver provision to determine whether the Secretary's decision whether to waive the statutory three-year ownership requirement was committed to his discretion by the Food Security Act of 1985. Like the statute at issue in *Webster*, the text of the Food Security Act of 1985 permits the Secretary to waive the three-year ownership requirement only if "*the Secretary determines* that the land was acquired under circumstances that give adequate assurance that such land was not acquired for the purposes of placing it in the [CRP]." 16 U.S.C. 3835(a)(1)(C) (emphasis added). As the Eighth Circuit explained, that provision "gives the Secretary extremely broad discretion and supplies no objective criteria for determining the existence of adequate assurance." Pet. App. 13a.

2. There is no conflict between any of the decisions cited by petitioner and the Eighth Circuit's conclusion that the Secretary's decision whether to waive the three-year ownership requirement under the Food Security Act of 1985 is not subject to review under the APA. In fact, the Eighth Circuit's decision in this case is the first decision by any federal court of appeals on this question.

Petitioner implicitly concedes as much, because petitioner does not claim that the decision below squarely conflicts with any other circuit court decision interpreting the Food Security Act of 1985. Instead, petitioner maintains that there is some confusion among the circuits on the proper methodology for analyzing reviewability questions. Petitioner argues that the court of appeals, in looking only to the statutory language to determine whether there was law to apply, applied this Court's decisions in *Chaney* and *Webster* too literally, and that such a literal approach is inconsistent with the approach developed by the District of Columbia Circuit in *NRDC, Inc.* v. *SEC*, 606 F.2d 1031 (1979). Pet. 9-13. In *NRDC, Inc.* v. *SEC*, the court concluded that reviewability determinations under 5 U.S.C. 701(a)(2) are to be guided by "pragmatic considerations," and cited three factors to be used to determine whether there was "law" to be applied: "(1) the need for judicial supervision to safeguard the interests of the plaintiffs; (2) the impact of review on the effectiveness of the agency in carrying out its congressionally assigned role; and (3) the appropriateness of the issues raised for judicial review." 606 F.2d at 1044. Petitioner claims that the Fourth, Sixth, and Seventh Circuits follow that methodology, rather than the one applied by the Eighth Circuit in this case.[4] That claim does not warrant review by this Court.

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[4] See *Sinai Hospital of Baltimore, Inc.* v. *Horvitz*, 621 F.2d 1267 (4th Cir. 1980); *Gillis* v. *HHS*, 759 F.2d 565 (6th Cir. 1985); *Cardoza*

Each of the cases cited by petitioner predates this Court's decision in *Webster* v. *Doe*, *supra*. For that reason, even if the pragmatic approach followed in those cases were in tension with the more rigorous statutory approach endorsed by this Court in *Webster*, there is no reason to believe that those courts would not today follow the same type of analysis that this Court applied in that case. In fact, other decisions by those courts in cases decided after *Webster* or *Chaney* indicate that those circuits now do look to the text of the governing statute in making reviewability determinations.[5] Accordingly, while there may have been some disagreement before *Webster* among the circuits over the correct reviewability analysis, that is no longer the case as the courts apply this Court's decision in *Webster*.

Nor is there any merit to petitioner's suggestion that *Webster* and *Chaney* left unresolved the approach to be used in making review determinations under Section 701(a)(2)—at least where, as here, the text of the pertinent statute itself reveals Congress's intent to leave a decision to the agency's unreviewable discretion. In *Chaney*, this Court clearly disfavored reliance on pragmatic considerations in making

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v. *Commodity Futures Trading Comm'n*, 768 F.2d 1542 (7th Cir. 1985). Petitioner also states that the Eighth Circuit had endorsed the so-called pragmatic approach in *Tuepker*, 708 F.2d at 1332, before rejecting that approach in this case. Pet. 11-12.

[5] See *United States Information Agency* v. *KRC*, 905 F.2d 389, 396 (D.C. Cir. 1990) (citing *Webster* and looking to statutory text to make reviewability determination); *Scalise* v. *Thornburgh*, 891 F.2d 640, 648 (7th Cir. 1989) (reviewability determination is based on the text and structure of the statute, its legislative history, and the nature of the agency action), cert. denied, 110 S. Ct. 1815 (1990); *Kenmons Wilson, Inc.* v. *FAA*, 882 F.2d 1041, 1045-1046 (6th Cir. 1989) (relying on statutory language in ruling that agency action was reviewable); *Electricities of North Carolina* v. *Southeastern Power Admin.*, 774 F.2d 1262, 1265-1266 (4th Cir. 1985) (relying on statutory text to determine reviewability of agency action).

reviewability determinations. *Chaney* described the analysis first adopted in *NRDC, Inc.* v. *SEC*, 606 F.2d at 1043, and applied by the D.C. Circuit in *Chaney* as nothing more than "an assessment of whether the interests at stake are important enough to justify intervention in the agencies' decision-making." 470 U.S. at 834. *Chaney* then emphasized that "[t]he danger that agencies may not carry out their delegated powers with sufficient vigor does not necessarily lead to the conclusion that courts are the most appropriate body to police this aspect of their performance. That decision is in the first instance for Congress, and we therefore turn to the [relevant statute] to determine whether in this case Congress has provided us with 'law to apply.'" *Ibid.*

Any doubt about the validity of the pragmatic considerations approach was certainly laid to rest in *Webster*. *Webster*'s emphasis on the text and structure of the statute involved provides a clear indication that the pragmatic approach is no longer acceptable. As the Eighth Circuit correctly observed, "*Webster* cannot be read as confining this approach specifically to agency refusals to take enforcement action, or in general to contexts in which a presumption of nonreviewability would apply." Pet. App. 11a.

3. As a final matter, petitioner contends that the waiver provision of the Food Security Act of 1985 does include a standard against which the Secretary's action can be reviewed. Petitioner claims that the phrase "adequate assurance" is a standard by which the Secretary's waiver determination can be reviewed. The court of appeals correctly rejected that contention.

Contrary to petitioner's claims, Congress' use of the term "adequate assurance" in this particular context does not supply the courts with an objective standard for review of the Secretary's decision. Congress authorized the Secretary to waive the three-year ownership requirement if "*the Secretary determines*" that such assurances exist, 16 U.S.C.

3835(a)(1)(C) (emphasis added), not if a court finds after-the-fact that the proffered assurances are adequate. Congress provided no criteria in the Act for determining what circumstances constitute "adequate assurance" that land was not acquired for placement in the CRP. Rather, Congress specified that the Secretary must make his own determination as to whether the circumstances of a land acquisition provide adequate assurance that the land was not acquired because of the CRP.

As the court of appeals observed, in determining whether there is a standard for reviewing agency action under Section 701(a)(2), *Webster* makes a distinction between "the objective existence of certain conditions and the [agency's] determination that such conditions are present." Pet. App. 12a (quoting *Kreis* v. *Secretary of the Air Force*, 866 F.2d 1513, 1508 (D.C. Cir. 1989)). The law at issue in *Webster* authorized the Director of Central Intelligence to dismiss a CIA employee whenever the Director "shall deem such termination necessary or advisable in the interests of the United States." 50 U.S.C. 403(c). This Court noted that "[t]his standard fairly exudes deference to the Director, and appears to us to foreclose the application of any meaningful judicial standard of review." *Webster*, 486 U.S. at 600. As the court of appeals correctly observed in this case, the text of the waiver provision at issue here "draws the same type of distinction by providing for an exception from the three-year ownership requirement if '*the Secretary determines* that the land was acquired under circumstances that give adequate assurance that such land was not acquired for the purpose of placing it in the program established by this subchapter.'" Pet. App. 12a-13a (emphasis added by the court).

Finally, as the court of appeals observed, the wide latitude given the Secretary under the waiver provision is in keeping with the broad discretion generally accorded the Secretary in governing various aspects of the Conservation

Reserve Program. Pet. App. 13a. The Food Security Act of 1985 contains various indicia of congressional intent to leave program participation determinations to the broad discretion of the Secretary. While the Act sets forth the parameters of the Program, the Secretary has discretion to (1) reduce the amount of acreage included in the Program in a given fiscal year, 16 U.S.C. 3831(c); (2) open the Program to land that does not satisfy eligibility guidelines upon a determination of environmental danger, 16 U.S.C. 3831(c)(2); (3) increase the percentage of county acreage included in the Program "to the extent that [he] determines that such action would not adversely affect the local economy of such county," 16 U.S.C. 3831(d); (4) determine in individual cases whether cost-sharing is appropriate, 16 U.S.C. 3834(c); (5) establish different criteria for participation in different States and regions of the country, 16 U.S.C. 3834(c)(3)(C); and (6) give priority to landowners and operators subject, in his determination, to the highest degree of economic stress, 16 U.S.C. 3834(c)(3)(D). Such express grants of administrative discretion are written in broad, permissive language and reflect a legislative intent that the Secretary retain the maximum amount of flexibility in implementing and administering the Conservation Reserve Program in a manner that is responsive to varying environmental and economic conditions throughout the United States.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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